Supreme Court, U.S.
FILED
MAY 29 2001
OFFICE OF THE CLERK

No. 00-1327

In the Supreme Court of the United States

ADELE J. FASANO, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIO RICHARDS-DIAZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Most of respondent's brief in opposition (Br. in Opp. 2-10, 19-25) is directed to a defense of the court of appeals' decision in this case, which held that (a) the district court had habeas corpus jurisdiction over respondent's challenge to his final order of removal (see Pet. App. 4a); (b) the repeal of former 8 U.S.C. 1182(c) (1994), which previously authorized the Attorney General to grant discretionary relief from deportation to certain aliens, by Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, is applicable to all aliens placed in removal proceedings on or after April 1, 1997, include those who, before that date, committed and were convicted of the

crimes that rendered them removable (see Pet. App. 6a-9a); but (c) an alien who pleaded guilty to such an offense before April 1, 1997, and shows that he specifically relied on the state of the law before that date, under which he would have been eligible for relief under Section 1182(c), may still be eligible for such relief (see *id.* at 9a-10a). As the Court is aware, these issues are presently before the Court in *INS* v. *St. Cyr*, No. 00-767, and *Calcano-Martinez* v. *INS*, No. 00-1011 (both argued Apr. 24, 2001). Accordingly, the petition in this case should be held for the Court's decision in *St. Cyr* and *Calcano*.

Respondent raises two additional arguments, both of which were rejected by the court of appeals (see Pet. App. 10a-11a). First, he argues (Br. in Opp. 13-17) that Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277 (enacted Apr. 24, 1996), which amended Section 1182(c) to make aliens convicted of aggravated felonies ineligible for discretionary relief from deportation, is unconstitutional because Section 440(d) applies only to aliens placed in deportation proceedings in the United States, and not to aliens placed in exclusion proceedings when they seek to return to the United States. As the court of appeals explained (Pet. App. 10a), AEDPA Section 440(d) played no role in the decisions of the immigration judge and the Board of Immigration Appeals in this case. AEDPA Section 440(d) *amended* Section 1182(c) and therefore applied only while Section 1182(c) remained in effect (*i.e.*, in cases in which deportation or exclusion proceedings were commenced prior to April 1, 1997). See Pet. 5-6. With respect to aliens placed in the new removal proceedings on or after April 1, 1997, however, IIRIRA Section 304(b) *repealed* Section 1182(c) altogether. See

Pet. 5. The amendments made by AEDPA Section 440(d) to Section 1182(c) prior to its repeal are therefore of no legal consequence in such cases. Respondent was placed in removal proceedings in June 1997 under IIRIRA (see Pet. 7) and therefore cannot obtain relief under Section 1182(c), with or without its amendment by AEDPA Section 440(d).[1]

Second, respondent argues (Br. in Opp. 17-19) that the courts should exercise their equitable powers to terminate his removal proceeding and direct the Immigration and Naturalization Service to place him in pre-IIRIRA deportation proceedings *nunc pro tunc*, so that he may apply for relief under old Section 1182(c). As the court of appeals observed, that "novel argument" (Pet. App. 10a) runs afoul of 8 U.S.C. 1252(g) (Supp. V 1999), which provides that "no court shall have jurisdiction to hear any cause or claim * * * arising from the decision or action by the Attorney General to commence proceedings * * * against any alien," except pursuant to the judicial-review procedures of Section 1252(a)—which require that all challenges to removal orders be heard, if at all, on petition for review in the court of appeals. Respondent's argument is a claim arising from the decision or action of the Attorney

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[1] In any event, every court of appeals that has considered the constitutional challenge to AEDPA Section 440(d) that respondent has identified has rejected it. See *Almon* v. *Reno*, 192 F.3d 28, 29-31 (1st Cir. 1999), supplemented, 214 F.3d 45, cert. denied, 121 S. Ct. 83 (2000); *Domond* v. *INS*, 244 F.3d 81, 86 (2d Cir. 2001); *DeSousa* v. *Reno*, 190 F.3d 175, 184 (3d Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999); *Asad* v. *Reno*, 242 F.3d 702, 706 (6th Cir. 2001); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1153 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000).

General to commence proceedings against him, and this case does not arise on a petition for review presented directly to the court of appeals. Respondent's claim is therefore barred by Section 1252(g). See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-487 (1999).[2]

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For the foregoing reasons as well as those set forth in the petition, the petition for a writ of certiorari should be held pending the Court's decisions in *INS* v. *St. Cyr*, No. 00-767, and *Calcano-Martinez* v. *INS*, No. 00-1011, and then disposed of as appropriate in light of the Court's decisions in those cases.

Respectfully submitted.

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[2] In seeking to be placed, *nunc pro tunc*, in deportation proceedings so that he could apply for Section 1182(c) relief, respondent contends that the INS should have instituted deportation proceedings against him in June 1996, when he was released from prison. See Br. in Opp. 18. By that time, however, AEDPA Section 440(d) had already amended Section 1182(c) to render aggravated felons in deportation proceedings ineligible for relief under that provision. Thus, the judicial relief he seeks—to place him in deportation proceedings under pre-IIRIRA law—not only is jurisdictionally barred by Section 1252(g), but also would not render him eligible for Section 1182(c) relief.